Supreme Court, U. S.
FILED
FEB 17 1978
MICHAEL RODAK, JR., CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1977

No. 77-961

NEW YORK TELEPHONE COMPANY, WESTERN ELECTRIC COMPANY, AMERICAN TELEPHONE & TELEGRAPH COMPANY, LONG LINES DEPARTMENT, AND EMPIRE CITY SUBWAY COMPANY (LIMITED),

Petitioners,

against

NEW YORK STATE DEPARTMENT OF LABOR, LOUIS L. LEVINE, INDUSTRIAL COMMISSIONER OF THE NEW YORK STATE DEPARTMENT OF LABOR, NEW YORK STATE DEPARTMENT OF TAXATION & FINANCE, AND JAMES H. TULLY, JR., STATE COMMISSIONER OF TAXATION & FINANCE,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR RESPONDENTS IN OPPOSITION

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INDEX

	PAGE
Question Presented	1
Statement of the Case	2
(A) The Statute: Unemployment Insurance Law § 592.1	2
(B) Financial Factors During the Strike	2
(C) The Statistics	3
Reasons Why Certiorari Should Be Denied	5
I. The Petition Presents No Substantial Federal Question	5
II. There is no Genuine Circuit Conflict on Which to Base a Request for the Granting of Certiorari	14
Conclusion	18

Table of Authorities

I. Cases

American Broadcasting Co. v. *New York State Department of Labor*, 77 Civ. 2995 (S.D.N.Y. 1977) 17

Batterton v. *Francis*, 432 U.S. 416 (1977) 13

California Dept. of Human Resources Development v. *Java*, 402 U.S. 121 (1971) 7

Dow Chemical Co. v. *Taylor*, 428 F. Supp. 86 (E.D. Mich. 1977) 16

Grinnell Corporation v. *Hackett*, 475 F. 2d 449 (1st Cir.), *cert. denied*, 414 U.S. 858 (1973) 4, 14, 15, 16

PAGE

Hawaiian Tel. Co. v. *State of Hawaii Dept. of Labor & Industrial Rel.*, 405 F. Supp. 275 (D. Hawaii 1976), *appeals docketed* (9th Cir. March 19 and May 12, 1976, Nos. 76-1584, 76-2056), *petition for cert. filed*, 46 U.S.L.W. 3454 (January 4, 1978) .. 6, 16

Hicks v. *Miranda*, 422 U.S. 332 (1975) 6

Kimbell, Inc. v. *Employment Security Commission of New Mexico*, 429 U.S. 804 (1976) 5, 6, 7, 8, 9, 15, 16, 17

Lodge 76, IAM v. *Wisconsin Employment Rel. Comm'n.*, 427 U.S. 132 (1976) 13

Nash v. *Florida Industrial Commission*, 389 U.S. 235 (1967) 14

Ohio Bureau of Employment Services v. *Hodory*, 431 U.S. 471 (1977) 7, 11, 17

Olin Corp. v. *State of Illinois Dept. of Labor*, Civ. No. 77-5156 (S.D. Ill. January 9, 1978) 17

Powell v. *United States*, 338 F.2d 556 (7th Cir. 1964) 17

San Diego Building Trades Council v. *Garmon*, 359 U.S. 236 (1959) 13

Steward Machine Co. v. *Davis*, 301 U.S. 548 (1937) .. 10, 13, 14

Super Tire Engineering Co. v. *McCorkle*, 550 F. 2d 903 (3rd Cir.), *cert. denied*, 46 U.S.L.W. 3215 (October 4, 1977), *rehearing denied*, 46 U.S.L.W. 3437 (January 10, 1978) 6, 7, 16

Virgin Islands Telephone Corp. v. *Upson*, Civ. No. 77-276 (D. Virgin Islands, November 11, 1977) .. 17

II. Statutes

A. Federal

PAGE

Federal Unemployment Tax Act 26 U.S.C. §§ 3301 *et seq.* 10, 11

Food Stamp Act of 1964, 7 U.S.C. §§ 2011 *et seq.* 12

National Labor Relations Act as amended, 29 U.S.C. §§ 151 *et seq.* 9, 10, 11, 12, 13, 14

Railroad Unemployment Insurance Act, 45 U.S.C. §§ 351 *et seq.* 12

Social Security Act of 1935, Ch. 531, 49 Stat. 620 in Title 42 U.S.C. 10, 11, 12, 13

B. State

Arizona—Ariz. Rev. Stat. Ann.. § 23-777 (amended 1952) 8

Connecticut — Conn. Gen. Stat. Ann. §§ 31-236 (amended 1977), 31-236(a) (1969) 8

Florida—Fla. Stat. Ann. § 443.06 (amended 1972) ... 8

Hawaii—Hawaii Rev. Stat. §§ 383-30, 385-7 (amended 1973) 6, 8, 16

Illinois—Ill. Rev. Stat., ch. 48, § 434 (amended 1976) 17

Maine—26 Me. Rev. Stat. Ann. § 1193 (amended 1977) 8

Massachusetts—Ann. Laws of Mass. C. 151A § 25 (amended 1976) 8

Michigan—Mich. Comp. Laws Ann. § 421-29 (amended 1975) 8

Montana—Rev. Codes of Mont. § 87-106 (amended 1977) 8

Nevada—Nev. Rev. Stat. 612.395 (1955) 8

PAGE

New Hampshire—N.H. Rev. Stat. Ann. 282:4 (amended 1973) 8

New Mexico—N.M. Stat. Ann. § 59-9-5(d) (amended 1975) 6, 7, 8, 16

New York—N.Y. Labor Law "Unemployment Insurance Law" § 592.1 (amended 1958) 2, 5, 7, 8, 12, 13

West Virginia—W.Va. Code § 21A-6-3 (amended 1976) 8

III. Other Sources

A. Congressional Materials

H.R. Rep. No. 1402, 91st Cong., 2d Sess. (1970), 1970 U.S. Code Cong. and Admin. News pp. 6025, 6035 12

S. Rep. No. 628, Senate Committee on Finance on H.R. 7020, 74th Cong., 1st Sess. (1935) 10

79 Cong. Rec. 9283 (1935) 10

B. Treatise

2A Sutherland Statutory Construction § 49.10 at 261 (4th ed. 1973) 11

In the

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OCTOBER TERM, 1977

No. 77-961

New York Telephone Company, Western Electric Company, American Telephone & Telegraph Company, Long Lines Department, and Empire City Subway Company (Limited),

Petitioners,

against

New York State Department of Labor, Louis L. Levine, Industrial Commissioner of the New York State Department of Labor, New York State Department of Taxation & Finance, and James H. Tully, Jr., State Commissioner of Taxation & Finance,

Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Second Circuit

BRIEF FOR RESPONDENTS IN OPPOSITION

Question Presented

Whether, in view of the expression of national labor policy by Congress in the National Labor Relations Act and the Social Security Act, and the repeated rejection by Congress of demands that the individual states be prohibited from paying unemployment compensation and other benefits to striking employees, the Court of Appeals for the Second Circuit correctly refused to create a judicial bar to the implementation of New York's unemployment insurance law as it relates to strikers?

Statement of the Case

(A) The Statute: Unemployment Insurance Law § 592.1

The "significant impact" which New York's law is alleged to have had on petitioners (hereinafter "Telco") in the forty years in which this statute has existed in substantially the same form, is the development of a single strike exceeding the statutory eight week suspension and waiting period. Petitioners contend that but for the availability of unemployment benefits in New York,* the Telco employees would have ratified the pattern contract negotiated in July, 1971. The facts rebut this assumption. In the numerous States** which provide for unemployment benefits during a strike where an employer (such as a telephone company) continues in substantial operation, the Bell System employees ratified the national contract. Employees in these other States would have been paid unemployment compensation from the outset. Yet it was the New York employees who were barred from such payments for the first eight weeks who voted to strike, while those whose states' unemployment benefit provisions gave them the greater advantage voted to accept the company's offer.

(B) Financial Factors During the Strike

Although the Telco employees would have been eligible for unemployment insurance for many more months at the time of settlement, they agreed to a contract which was substantially the same as the one originally offered (Tr. 177-178). It differed from the wage increase in the original pattern settlement by a maximum of $1.50 *per week* for

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* The maximum, erroneously cited by the District Court as $95 weekly (Appendix to petition, 28a) was $75 per week (Trial Transcript, p. 776 [hereinafter "Tr."]) and even this was available only to employees whose base salary was at least $149 per week. Petitioners supply this Court (p. 6) with the expected maximum for September, 1978, but omit the $75 figure applicable during the strike.

** E.g. Illinois, Indiana, Maine, Massachusetts, New Hampshire, Vermont, Pennsylvania and New Jersey. Defendants' Exhibit 1, "Comparison of State Unemployment Insurance Laws," United States Department of Labor, Manpower Administration, Unemployment Insurance Service (January 1972) Table 405 (hereinafter "U.S. Labor Dept. Chart, Defs. Ex. 1").

some upstate employees in the top crafts (Tr. 105-106), and the Saturday differential pay was not substantial (Tr. 919). Indeed, Telco's own statement and outline drafted for the federal Wage Board after the strike described the settlement as follows: "All terms [are] generally identical with the pattern of those of other Bell System companies," and the slight additions to the pattern "are insignificant especially when one considers that their percentages are significantly reduced for the first year of the contract because of the seven months' strike." (Tr. 920-921 and Defs. Ex. 77).

Moreover, there was *no* financial pressure on Telco as a result of the strike. Dr. William Melody of the University of Pennsylvania* testified that the same instrumentality—the strike—acted in opposite directions to increase Telco's unemployment insurance tax while greatly decreasing its payroll expenses as it continued to receive revenues. Dr. Melody's "ballpark" (Tr. 710) estimate was that the total in wages not paid during the strike was $199 million for the New York Telephone Company and $231.5 million for the four plaintiffs combined (Tr. 705-706). The wages not paid by Telco summed to approximately $86 million *after* subtraction of overtime and other expenses incurred above the norm during the strike** (Tr. 709). This amount was greater than the benefits paid by an enormous margin.

(C) The Statistics

Petitioners allege that the challenged provision has had a substantial and prohibited impact on strikes and settlements. This cannot be determined by assumption or by "truisms".

What are the statistics?*** New York has a *shorter*

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* Dr. Melody has been an associate professor of communications economics at the School of Communications of the University since 1971, and prior to that (1966-1970) was a senior economist at the Federal Communications Commission (Tr. 690).

** The effect of the strike on revenues was very minor, according to Telco data (Tr. 701, 702, Defs. Exhs. 100, 104-106).

*** Respondents' statistics were presented by Dr. Samuel A. Richmond, a former Director of the American Statistical Asso-

(footnote continued on following page)

average strike duration than the average for other states (Tr. 1374, Defs. Ex. 113-A). Petitioners dealt with this by arguing that it is only strikes of over eight weeks which are "lengthened" because of unemployment insurance payments. However, the data for this category are equally unhelpful for petitioners' purposes. When strike duration statistics are analyzed by state *and industry,* the data show that the average strike duration for all industries in the over-eight-week group is 14.80 weeks (Tr. 1385). Those industries which in all other states had longer strikes than this average had *shorter* strikes in New York (Tr. 1403, Defs. Ex. 122-A).*

Thus, the data on behavior**—how long do employees in

(footnote continued from preceding page)

ciation and author of a leading text on statistical analysis. His study of the period from 1965-1974 rebutted petitioners' witness Dr. Lewis Perl's analysis of a five year period. Dr. Perl subsequently reported the same statistical results as to the ten-year data which had been set out by Dr. Richmond. Defs. Exhs. 113-A and 113-B. Dr. Richmond, Dean of the Graduate School of Management of Vanderbilt University, was at the time of trial a professor of economics and statistics at the Columbia University Graduate School of Business (Tr. 1370-1371). The District Court did not mention Dr. Richmond or his testimony in its opinion.

* Omitting the industry factor is a less exact method. *Cf. Grinnell Corp.* v. *Hackett,* 475 F.2d 449, 459 (1st Cir.), *cert. den.* 414 U.S. 858, 879 (1973). The results under this method, which was used by petitioners, also fails to support their claims. New York is sixth out of 50 in duration over a 10-year period (and virtually the same as the seventh state Virginia), and Rhode Island (whose statute is very similar to New York's) is 29th (Defs. Exh. 113-B).

** Petitioners submitted at trial an assortment of newspaper clippings, letters, and taped messages which they offered as views on unemployment insurance by union representatives or newspaper writers. As Dr. Mason Haire, professor of psychology and organization behavior in the School of Management of the Massachusetts Institute of Technology (MIT) concluded and reiterated on cross-examination, the great bulk of the material was not an exhortation to "do it, so that the strike will work" but "an administrative service to make sure that the things that are available were known to be available . . ." (Tr. 605, 654-655). An opinion survey presented by petitioners resulted in contacting only eight people who had ever been on strike (Tr. 460, 416). Dr.

(footnote continued on following page)

fact strike, what settlement levels are in fact achieved*—show that New York's law has no significant impact on the outcome of collective bargaining.

Reasons Why Certiorari Should Be Denied

I. The Petition Presents No Substantial Federal Question.

Petitioners urge that this Court exercise its certiorari discretion herein to "settle" matters of public importance (p. 14). While the issues raised in the petition may involve an interesting subject for debate, they present no substantial federal question and must therefore be debated in other forums.

A. This Court has issued a ruling which is squarely in point as to the preemption claims herein. In *Kimbell, Inc.* v. *Employment Security Commission of New Mexico,* 429 U.S. 804 (1976) an appeal from a judgment of the Supreme Court of New Mexico presented the question of whether the State's payment of unemployment benefits to strikers contravened the "federal labor policy requiring state neutrality in [the] collective bargaining process." (45 U.S.L.W. 3052, July 27, 1976). This Court did not find a Supremacy Clause violation, and dismissed the appeal "for

(footnote continued from preceding page)

Haire remained unconvinced that a public opinion poll that votes on whether unemployment insurance prolongs strikes is the proper method of arriving at the truth on that question (Tr. 610-611). "If I were charged somehow with determining the appropriateness of the New York State UI Law, I would certainly want to study the behavior rather than the opinions" (Tr. 603).

* Petitioners presented no data to show that settlements in New York are higher than elsewhere. Respondents' data was analyzed by Dr. James W. Kuhn, Vice Dean of the Columbia University Graduate School of Business. He testified that the wage trend in New York State over a substantial period of time was lower than the average for other states (Tr. 1030-1031, 1036-1037). His industry analysis of all the available data covered 9.52% of the industries in which strikes of over eight weeks occurred in New York, Rhode Island, and other states (Defs. Ex. 122A). Rhode Island also has "a clearly lower wage level for 'average gross hourly earnings'" than the other industrial states in the region (Plaintiffs' Exhibit 317, p. 12).

want of a substantial federal question." Such dismissals, unlike a denial of certiorari, are rulings on the merits of the appellants' claims. *Hicks* v. *Miranda,* 422 U.S. 332, 344 (1975).

Petitioners and movants would nullify the *Kimbell* decision entirely. Without the slightest explanation, they urge the unconstitutionality of the unemployment compensation law of Hawaii—a provision which is identical to that of New Mexico.* In their effort to obtain review of the decision below, they rely heavily (p. 12) on a District Court holding which struck down Hawaii's statute. *Hawaiian Tel. Co.* v. *State of Hawaii Dep't of Labor & Indus. Rel.,* 405 F. Supp. 275 (D. Hawaii 1976), *appeals docketed* (9th Cir. Mar. 19 and May 12, 1976, Nos. 76-1584, 76-2056), *petition for cert. filed,* 46 U.S.L.W. 3454 (January 4, 1978) (hereinafter *"Hawaiian Telco"*). Petitioners apparently believe that the District Court's decision supersedes this Court's holding in *Kimbell.*

Since such nullification of *Kimbell* would violate this Court's teaching in *Hicks* v. *Miranda, supra,* there are two alternatives remaining. Either *Kimbell* is controlling on all cases challenging the grant of unemployment compensation during strikes, as was held by the Third Circuit in *Super Tire Engineering Co.* v. *McCorkle,* 550 F. 2d 903 (3d Cir.), *cert. den.,* 46 U.S.L.W. 3215 (Oct. 4, 1977), *rehearing denied,* 46 U.S.L.W. 3437 (Jan. 10, 1978),** or it is binding only as to statutes utilizing New Mexico's approach—the granting of benefits if the employer continues to operate during the strike.***

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* Hawaii Rev. Stat. §§ 383-30, 385-7 (amended 1973); N.M. Stat. Ann. § 59-9-5(d) (amended 1975).

** The Court below did not find *Kimbell* controlling as to New York's statute, and therefore proceeded to examine and wholly reject petitioners' claims on the merits. Appendix to petition, at 7a, n. 2. (Hereinafter, all references to petitioners' appendix appear with suffix "a".)

*** As noted *supra,* petitioners not only continued to operate during the strike which forms the sole basis for their complaint, but enormously decreased their payroll expenses while revenues continued at substantially the same level. Tr. 705-706, 709, 710.

As will be shown below, there is no basis in federal law for petitioners' claims. This demonstrates that the decision cannot be confined to a particular statutory option.* Moreover, the limiting interpretation of *Kimbell* would not create the federal "uniformity" demanded by petitioners (p. 18). If *Kimbell* applies only to those statutes which are modelled along the New Mexico line, some state laws granting unemployment benefits to strikers will be protected while others will be subject to challenge as federally "preempted."**

The vast majority of states have repudiated the view that unemployment compensation must be withheld during industrial controversies, or should be paid only to employees who have been formally "locked out" by their employers.*** These states have established a considerable range of statutory schemes, of which New York's and New Mexico's constitute two options. Unless this Court's ruling in *Kimbell* constitutes "a rejection of the substantive contention that federal labor policy precludes such compensation"**** federal courts will be asked to

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* A footnote in *Ohio Bureau of Employment Services* v. *Hodory,* 431 U.S. 471, 475 (1977) cited by movant Rochester Telephone Company (at p. 16), is not to the contrary. While *Kimbell* dealt with the right of a State to grant benefits to strikers, *Hodory* dealt with the rights of undisputed *non*-strikers, idled by an industrial controversy in another state, to receive unemployment compensation. Moreover, the Ohio law affecting such employees was challenged on the basis that plaintiffs had an alleged substantive right to receive unemployment compensation "when due" under § 303(a) of the Social Security Act of 1935 and this Court's decision in *California Dept. of Human Resources Development* v. *Java,* 402 U.S. 121 (1971), and not on the grounds of labor law preemption.

** Indeed, movant Chamber of Commerce recognizes the anomaly inherent in such a situation (p. 4), but fails to recall that this Court's decision in *Kimbell* has *inter alia* already established the validity of benefit payments in the numerous states which have laws like New Mexico's. (U.S. Labor Dept. Chart, Defs. Ex. 1.)

*** Defs. Ex. 1. New York's law is unique in *barring* payments during the first eight weeks of an industrial controversy, thus eliminating 89% of strikes from the payment category completely. (Defs. Ex. 113-A.)

**** *Super Tire Engineering Co.* v. *McCorkle, supra,* 550 F. 2d at 908.

evaluate these diverse statutes to determine which are "best."

The subjectivity of this exercise would be endless.* Should States be allowed to pay if the dispute is caused by a hazardous condition?** The employer's failure to conform to his own collective bargaining contract?*** An employer's violation of the labor law?**** Should employees receive benefits if they are not in the grade or class financing the dispute or not directly interested in it, or have been laid off from a *bona fide* subsequent job?*****

While the District Court herein found New York's statute more violative of "federal labor policy" than New Mexico's law (51a-53a), the District Court in Hawaii determined after trial that Hawaii's provision (identical to New Mexico's law upheld in *Kimbell*) was intrusive because of features not present in New York's enactment (405 F.Supp. at 284):

> "By focusing on the *effect* of collective action by employees upon the employer's business operations when the parties are in the throes of a collective bargaining conflict, it impinges upon 'the very subject addressed by Congress in NLRA' and therefore is preempted, unless Congress has provided otherwise." (Footnotes omitted). (Emphasis added).

Such contradictions occur when courts are asked to make judgments which are essentially legislative in nature. Since,

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* Testimony by nationally known experts concerning statistics directly countering petitioners' theories (see pp. 3-5, *supra*), was disregarded by the District Court, which accepted a "truism" about the payment of benefits (28a, 38a).

** 26 Me. Rev. Stat. Ann. § 1193 (amended 1977).

*** E.g. W.Va. Code § 21A-6-3 (amended 1976);
N.H. Rev. Stat. Ann. 282:4 (amended 1973).

**** E.g. Ariz. Rev. Stat. Ann. § 23-777 (amended 1952);
Rev. Codes of Mont. § 87-106 (amended 1977).

***** Fla. Stat. Ann. § 443.06 (amended 1972);
Nev. Rev. Stat. 612-395 (1955);
Conn. Gen. Stat. Ann. §§ 31-236 (amended 1977), 31-236(a) (1969);
Ann. Laws of Mass. C-151A § 25 (amended 1976);
Mich. Comp. Laws Ann. § 421-29 (amended 1975).

as will be seen below, Congress intended to permit variations in State law as to the eligibility of strikers for benefits, the nature of that permission may not be altered by introducing a requirement that each variant be judicially approved.

B. This Court's decision in *Kimbell* and the thorough analysis of the merits by the Second Circuit effectively dispose of the substantive arguments raised in the petition. However, in view of the multiplicity of contentions proffered by petitioners and movants, further discussion may be of assistance to the Court.

Petitioners cite no provision of the National Labor Relations Act,* nor any material expression of congressional intent, to support their Supremacy Clause claims. The National Labor Relations Board, which has been charged by Congress with the duty of enforcing the NLRA, and the United States of America speaking through former Solicitor General Bork have come before this Court to state categorically:

> "The preemption issue initially turns on Congress' intent when it enacted and subsequently amended the National Labor Relations Act . . . and the Social Security Act . . . as amended by the Federal Unemployment Tax Act . . . The history of those Acts shows that Congress concluded that a uniform policy on the payment of unemployment compensation to strikers was not essential to the federal regulatory scheme, and thus elected to leave this matter to the judgment of each state."**

Contrary to the implication throughout the petition, the NLRA did not spring forth from its own separate and unique Congress. The original National Labor Relations Act (Wagner Act) and the legislation establishing a na-

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* Pub. L. No. 74-198, 49 Stat. 449 (July 5, 1935), as amended 29 U.S.C. §§ 151 *et seq.*, hereinafter "NLRA."

** Brief of Solicitor General Bork and the National Labor Relations Board filed at the request of this Court in *Kimbell, Inc.* v. *Employment Security Commission of New Mexico*, Docket No. 75-1452, *appeal dismissed*, 429 U.S. 804 (1976), at p. 5.

tional unemployment insurance program (Title IX of the Social Security Act of 1935)* moved through Congress during the same session. The Wagner Act was enacted on July 5, 1935, and the Social Security Act on August 14, 1935. In fact, Senator Wagner was a sponsor of both statutes.** The 1935 Congress, speaking through the Social Security Act, established a number of restrictions governing payments of unemployment compensation, some of which dealt particularly with labor-management problems such as the granting of benefits during strikes and lockouts.*** Congress did not, however, bar the payment of such benefits to strikers.****

The Senate Finance Committee Report on the Social Security Act of 1935, in explaining the legislative choice involved, stated unequivocally:

> "Except for a few [necessary] standards . . . the States are left free to set up any unemployment compensation system they wish, without dictation from Washington."*****

The subsequent efforts to introduce into Congress the restrictions on the States which petitioners are now seeking from the judiciary, are set out in detail in the decision below (13a-16a). In 1947, for example, the House enacted

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* Pub. L. No. 74-271, §§ 901-910, 49 Stat. 639-45, now the Federal Unemployment Tax Act, 26 U.S.C. § 3301-09.

** 79 Cong. Rec. 9283 (1935).

*** See e.g. Social Security Act § 903(a)(5), currently 26 U.S.C. § 3304(a)(5) of the Federal Unemployment Tax Act ("FUTA"), which provides *inter alia:*

> "(5) compensation shall not be denied in such State to any otherwise eligible individual for refusing to accept new work under any of the following conditions:
>
> (A) if the position offered is vacant due directly to a strike, lockout, or other labor dispute;"

**** It should be noted that the New York statute predates the enactment of the NLRA and the relevant provisions in the Social Security Act of 1935, and that Congress was aware of the State's provision (11a-12a).

***** S. Rep. No. 628, 74th Cong. 1st Sess. 13 (1935); see also *Steward Machine Co.* v. *Davis,* 301 U.S. 548, 593 (1937).

amendments to the NLRA which provided that strikers who received unemployment benefits would thereby forfeit their status and protection as employees under the Act. After a House-Senate Conference, the Senate revision which omitted that exclusion was accepted and passed (13a-14a).

Repeated congressional consideration of whether strikers should be disqualified from receiving various forms of public assistance resulted not only in refusals to enact amendments, but also in the passage of several important provisions (see point I [C] *infra*).* Petitioners' attempt to characterize this legislative history as "unconnected and isolated" (p. 21) signally fails to deal with the extensive material supporting the Second Circuit's conclusions.

Indeed, in *Ohio Bureau of Employment Services* v. *Hodory,* 431 U.S. 471 (1977), this Court rejected preemption claims under FUTA and the Social Security Act by considering precisely the same kind of legislative history as was cited by the court below. This Court analyzed (431 U.S. at 482 *et seq.*) Committee reports dealing with the subject, pertinent statutory provisions relating to payment of unemployment compensation to strikers, and more recent congressional amendments, and concluded:

> "[S]tudy of the various provisions cited shows that when Congress wished to *impose* or *forbid* a condition for compensation, it was able to do so in explicit terms." (Emphasis added). (431 U.S. at 488.)

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* Petitioners call this "congressional silence" (p. 23), despite testimony on the floor of Congress (see e.g. statements of the House Ways & Means Committee Chairman [14a]), pertinent reports from both Houses, and the enactment of bills which mandate the payment of benefits to striking employees. Their reference (n. 19, p. 23) to 2A Sutherland, *Statutory Construction,* § 49.10 at 261 (4th ed. 1973) is also inapposite, since that discussion concerns acquiescence or inaction by a Legislature as signifying *adoption* (not rejection) of a statutory interpretation.

It should be noted that this Court was guided by "[t]he fact that Congress has chosen *not* to legislate on the subject of labor dispute disqualifications" (emphasis added) in rejecting the preemption challenge posed in *Ohio Bureau of Employment Services* v. *Hodory, supra,* 431 U.S. at 488-489 (1977), which will be discussed further *infra.*

It is indisputable that Congress is similarly capable of requiring or prohibiting a condition for payment of benefits under the NLRA.

C. Petitioners argue that New York's unemployment insurance law is preempted by federal labor policy and violates the requirement of governmental neutrality in labor disputes. Neutrality is best defined by Congress, not petitioners.* New York's right to pay unemployment insurance to eligible strikers is not violative of national labor policy—it is the national labor policy. Petitioners ignore the obvious—that congressional intentions regarding labor relations are expressed in several different statutes, among them the Social Security Act, the Railroad Unemployment Insurance Act, and the Food Stamp Act.**

The Social Security Act provided a tax on employers in states which did not pass unemployment compensation laws, and therefore all the States enacted such statutes.*** Congress established certain mandatory standards governing payment of unemployment benefits during strikes but, as shown above, determined to permit—without requiring—the granting of such benefits to strikers. That permission is as much a part of the federal labor scheme

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* Congress has equated the *requirement* that food stamps be granted to strikers with the refusal "to take sides in labor disputes." H.R. Rep. No. 1402, 91st Cong., 2nd Sess. (1970), 1970 U.S. Code Cong. & Admin. News, pp. 6025, 6035.

** For example, the Social Security Act, *supra* at p. 10, requires payment of unemployment benefits to otherwise eligible claimants who refuse new work at the site of a strike; the Railroad Unemployment Insurance Act, Pub. L. No. 75-722, 52 Stat. 1094 (1938), as amended 45 U.S.C. § 351 *et seq.*, requires the payment of benefits to workers who participate in lawful strikes; and the Food Stamp Act of 1964, Pub. L. No. 88-525, 78 Stat. 703, as amended 84 Stat. 2048, 2050, 7 U.S.C. § 2011, § 2014(c) (1971), expressly provides that strikers are not disqualified from receiving food stamps.

*** 26 U.S.C. § 3301, § 3304. Yearly, the Secretary of Labor reviews, authorizes and certifies that each State plan complies with the mandate of § 3304. The Secretary has objected to some New York provisions, but not the industrial controversy provision (Tr. 766-768).

as is the NLRA's permission to resort to economic weapons.*

Thus, petitioners' reliance (p. 16) upon cases in the tradition of *San Diego Building Trades Council* v. *Garmon,* 359 U.S. 236 (1959) is misplaced.** In *Garmon* and its progeny, the state statutes at issue were unconnected with any federal program. Here, this Court is not presented with a preemption case but with a statute authorized by the Social Security Act and implemented by the State. See *Steward Machine Co.* v. *Davis,* 301 U.S. 548 (1937) in which this Court, in upholding the constitutionality of the Social Security Act against a claim that it usurped State powers, observed that "a wide range of judgment is given to the several states as to the particular type of statute to be spread upon their books" (301 U.S. at 593). This Court acknowledged New York's statute as well as those of five other states (301 U.S. at 587-588).

Understandably, petitioners have failed to explain how this case meets any of the requirements of a preemption

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* Petitioners argue (p. 22) that the State must prove that it has been explicitly authorized to enact the statutory option it has chosen. To the contrary, States do not need authority from the federal government to legislate. They have such a right unless an enactment is barred by a specific congressional prohibition. *Cf. Batterton* v. *Francis,* 432 U.S. 416, 429-432 (1977).

** This Court has defined two categories of cases in which it applies the principle of preemption: (1) "jurisdiction of the Board" as evidenced by *Garmon* and (2) cases which focus upon the question of whether Congress intended that "the conduct involved be unregulated and left to be controlled by the free play of economic forces." *Lodge 76, IAM* v. *Wisconsin Employment Rel. Comm'n,* 427 U.S. 132 (1976). This case does not fit either category, since the state action of granting unemployment benefits to eligible strikers after an eight week suspension and waiting period is an activity over which the NLRB has no jurisdiction, and is an activity which Congress intended the State to regulate. New York's unemployment insurance law, unlike the statute at issue in *Lodge 76, supra,* provides no power to "police" any of the parties to an industrial controversy. The State refuses to dictate any substantive terms in labor contracts.

case as established by this Court in its prior decisions.* Instead, upon the mere invocation of the term preemption, they ask this Court for an unprecedented and unwarranted restriction on New York's unemployment insurance program. This program was developed as part of a "cooperative endeavor"** by Congress and the various State legislatures, and has continued undisturbed as such since its inception.

II. There is no Genuine Circuit Conflict on Which to Base a Request for the Granting of Certiorari.

Petitioners commence their "conflicts" claim (p. 10) with a holding*** which would be contrary to the Second Circuit decision herein. However, this holding was not that of the First Circuit in *Grinnell Corp.* v. *Hackett,* 475 F. 2d 449 (1st Cir.), *cert. denied* 414 U.S. 858, 879 (1973), the opinion on which petitioners' argument of circuit conflict is based. Instead, it is contained in the District Court opinion which was reversed by the Court below. While the petition underscores the differences between the Second Circuit's views and those of the District Court which were considered and rejected, the differences between the Second Circuit's opinion and *Grinnell* fall far short of providing a basis for the granting of certiorari.

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* *Nash* v. *Florida Industrial Commission,* 389 U.S. 235 (1967) is also invoked (pp. 19-20), apparently because it contains general statements that States may not pass an unemployment compensation law which "frustrates federal legislation." In *Nash,* Florida refused to continue payment of unemployment compensation to a person who had filed an unfair labor practice charge against a former employer. Section 8(a)(4) of the NLRA *explicitly* provides that it is an unfair labor practice for an employer to discriminate against an employee because he or she has filed charges. The Court held that the statutory rule in the NLRA prohibiting coercive actions by employers against anyone making charges also applied to the States.

** *Steward Machine Co.* v. *Davis, supra,* 301 U.S. at 587.

*** ". . . [T]he New York Unemployment Insurance Law, insofar as it grants unemployment compensation to strikers, (a) constitutes state intervention on their behalf, (b) tips the economic scales in their favor and (c) forces New York employers to subsidize lengthy strikes against themselves, all in conflict with the pre-

(footnote continued on following page)

The Court below found that relevant legislative history established the intent of Congress to permit States to determine the direction of their own programs in the area at issue, while *Grinnell* found that the intent was not clear. However, on the fundamental question of whether this area was federally preempted, *Grinnell* shared the Second Circuit's doubts. The *Grinnell* Court held that phase two of the District Court's inquiry, the State's interest in the unemployment scheme, would have to be ruled upon only if plaintiffs prevailed on phase one, proof that payment of benefits "significantly frustrated the federal policy of collective bargaining . . ." (475 F. 2d at 459). The First Circuit went on to state that phase two would probably never be "reached" (*Id.*). It added further that even if this phase were reached, the District Court could "properly decline to find preemption" if it felt that the state and federal interests were closely balanced, "because of the historical and continuing Congressional awareness, opportunity, and demonstrated willingness to act in this field." (475 F. 2d at 457).

Indeed, the Grinnell Corporation would hardly be engaging in a simultaneous effort to ask this Court to *review* the *Grinnell* decision* if the holding there had supported their point of view and contradicted that of the Second Circuit. As the former Solicitor General of the United States and the National Labor Relations Board noted (p. 10) in their brief in *Kimbell:***

> "A final factor militating against plenary review in this case is that there is no conflict of decisions requir-

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(footnote continued from preceding page)

emptive federal labor policy of government neutrality in labor disputes . . . [T]he statute, to the extent it subsidized strikers, [is] invalid under the Supremacy Clause of the United States Constitution."

* We are advised that Grinnell Corporation has sought leave to file a cross-petition for certiorari out of time in this Court requesting rehearing in *Grinnell* v. *Hackett.* Their request was filed on January 4, 1977, the same day that petitioners filed their request for certiorari in *Telco.* The national Chamber of Commerce, a movant herein, was listed in Grinnell's papers as supporting its application.

** See p. 9, *supra.*

ing resolution by this Court. *Grinnell, supra,* while calling for a weighing of federal and state interests, did not find that the state statute conflicted with the federal statute but merely remanded the case for further proceedings."

One other Circuit has ruled on the question at issue. The Third Circuit's decision in *Super Tire Engineering Co.* v. *McCorkle, supra,* on which this Court denied rehearing last month, rejected the argument that a state provision permitting the payment of welfare to strikers violated federal welfare law and concluded further—under the mandate of *Kimbell*—that federal labor policy does not preclude the payment of unemployment compensation to strikers. (550 F. 2d at 908, 906).*

Petitioners' claims of a District Court "conflict," like its argument that the Second Circuit's opinion is incompatible with those of other Circuits, does not withstand analysis. The District Court in *Hawaiian Telco, supra,* concluded after a plenary trial that Hawaii's statute irreconcilably intrudes into the federal process of free collective bargaining and must therefore be "stricken down" (405 F. Supp. at 290). However, it is the *Hawaiian Telco* decision itself which has been "stricken down" by this Court. As we have seen *supra,* the statute upheld in *Kimbell* was identical to the provision at issue in the Hawaii case.**

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* This resolution of the attacks on welfare payments to strikers has significant implications in the case at bar. It must be recognized at the outset that unemployment benefits, unlike welfare payments, are available in New York only in the small percentage of strikes that are greater than eight weeks. Moreover, the result of paying welfare benefits to needy persons is to provide economic assistance to the group of strikers who can least afford to be without a salary and who—under petitioners' rationale—would otherwise quickly return to work. Welfare assists strikers as to whom there has *already been a finding that they have no alternate resources available.* As such eligibility does not frustrate "the policy of free collective bargaining embedded in the federal labor laws" (Petition, p. 19), the statute at bar clearly could not contravene any congressional prohibition.

** Prior to the Second Circuit decision herein and that of the Third Circuit in *Super Tire,* a Michigan District Court considering

(footnote continued on following page)

Thus, petitioners' difficulty is not that the law is uncertain but that it is settled, not that no guidance has been provided but that petitioners prefer not to be guided.* This Court's holding that no substantial federal question was presented in *Kimbell* and its ruling in *Hodory* that Congress has always been capable of requiring or prohibiting conditions as to eligibility for benefits, have answered the labor preemption claims raised herein. Each Circuit Court which has reached a final determination as to these claims has rejected them.

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preemption claims, in *Dow Chemical Co.* v. *Taylor,* 428 F. Supp. 86 (E.D. Mich. 1977), declined to proceed to trial but instead certified to the 6th Circuit the question of whether *Kimbell* foreclosed further proceedings in the case (No. 77-8064). The other District Court opinion cited by petitioners herein, *American Broadcasting Co.* v. *New York State Department of Labor,* 77 Civ. 2995 (S.D.N.Y. 1977), is not viable after the Second Circuit's definitive decision. *Cf. Powell* v. *United States,* 338 F. 2d 556 (7th Cir. 1964).

* See the decision of the District Court following *Super Tire* and *Telco,* dismissing with prejudice a request to enjoin payment of unemployment compensation to strikers in *Virgin Islands Telephone Corp.* v. *Upson,* Civ. No. 77-276 (D. Virgin Islands, November 11, 1977). Chief Judge Christian noted that "there is little likelihood that plaintiff would prevail upon a trial on the merits in view of the teaching of *Super Tire* . . . and further in view of the fact that [*Telco*], principally relied on by plaintiff, has been overturned . . ." See also *Olin Corp.* v. *State of Illinois, Dep't of Labor,* Civ. No. 77-5156 (S.D. Ill. January 9, 1978) (Ackerman, J.) dismissing a preemption challenge to Illinois' statute granting unemployment benefits to persons who refuse to cross picket lines. Ill. Rev. Stat. ch. 48, § 434 (1975). The court was guided by the Second Circuit's decision herein.

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be denied.

Dated: New York, New York
February 17, 1978

Respectfully submitted,

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